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Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1970.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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I. STATEMENT OF THE CASE

A. FACTS.

Respondent sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the Petition for a Writ of Certiorari.

In early September, 1967, Respondent, Earl D. Mosley, began to peacefully walk on the public sidewalks adjoining Jones Commercial High School in Chicago, Illinois, carrying a sign which stated that Jones Commercial

High School discriminated on the basis of race. (15, 16, 17, 18, 29, 57)* On March 26, 1968, the City of Chicago enacted an amendment to its existing ordinances that made this form of peaceful picketing disorderly conduct. (57) The amendment reads as follows:

> "193-1 A person commits disorderly conduct when he knowingly: * * *
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

Respondent testified to his motive for engaging in this picketing. He stated that he was concerned about the quality of education for Blacks and he was of the belief that Jones Commercial High School was discriminating against Black students in its admission policies and in the treatment that it afforded them.** After his repeated discussions with officials with respect to discrimination at Jones Commercial High School proved unsuccessful, Respondent turned to peacefully picketing the school, generally in the afternoon, either by himself or with a few other persons.

At the trial of this case, Petitioners admitted that *at all times* Respondent's activities were peaceful and orderly. (28, 29) They further admitted that his picketing

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* References are to Appendix of Record

** Whether Respondent's opinions were well-founded in fact is not, and has never been, an issue or relevant in this case, and the comments and insinuations to the contrary on Page 7 of the Petition are clearly inapposite and inappropriate.

never interrupted the free flow of traffic to and from the school and that they had no reason to believe that Respondent's activities would lead to acts which were not peaceful, orderly and quiet. (28, 29) Furthermore, at no stage during these proceedings did Petitioners ever take the position that there was a "serious likelihood" that Respondent's activity "might lead to acts which were not peaceful, orderly and quiet" as they now state on Page 9 of the Petition. Indeed, Petitioners admitted to the contrary, as noted above.

After the passage of the ordinance, Respondent contacted the Chicago Police and the City's Corporation Counsel. (19, 21) He was advised that he would be arrested if he continued to picket the high school. (19, 20) Respondent was never actually prosecuted for a violation of the ordinance, but Petitioners admitted that if he continued his activities in picketing the school, he would be arrested. (28, 29)

Respondent sought a declaratory judgment and an injunction to prevent the enforcement of this ordinance on the grounds that it violated his First Amendment right to freedom of speech, and that it was a violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment.

The District Court held that this was a proper proceeding for a declaratory judgment, and held that the ordinance was constitutional in all respects.

On appeal to the Seventh Circuit Court of Appeals, there were no disputed questions of fact; the only issue was whether the ordinance was unconstitutional on its face. On October 29, 1970, the Court of Appeals reversed the District Court and held that the Ordinance violated the First Amendment right to freedom of speech.

because the ordinance was overly broad and granted the relief sought by Respondent. The Court of Appeals did not deem it necessary to consider Respondent's other contentions as to why the ordinance was unconstitutional.

B. DECISION IN CITY OF ROCKFORD VS. GRAYNED AND PRESENT STATUS OF ILLINOIS LAW.

On September 29, 1970, the Supreme Court of Illinois held in *City of Rockford* vs. *Grayned,* 46 Ill.2d 486 (1970), that an ordinance of the City of Rockford identical to the said Section 193-1(i) was constitutional and it affirmed the conviction of the Defendant in that case. An examination of the decision of the Illinois Supreme Court (attached to the Appendix of Petitioners) reveals that the Court in *Grayned* considered *only* the question of whether the ordinance violated the Equal Protection Clause and the opinion conspicuously makes no mention of any argument as to whether the Rockford ordinance violates the First Amendment right to free speech. After the *Grayned* decision was announced, counsel for *Grayned* requested a rehearing and appended the Seventh Circuit's decision in *Mosley* vs. *Police Department* to the motion for rehearing, thereby calling the Illinois Supreme Court's attention to the First Amendment issue and the decision of the Seventh Circuit on the identical ordinance. However, the Supreme Court of Illinois denied the Petition for rehearing and the *City of Rockford* vs. *Grayned* case appeal is now pending before this Court. (Docket No. 6856)

In addition, counsel for Respondent calls the Court's attention to one other development—a case now pending in the Appellate Court of Illinois, *City of Chicago* vs. *Polito, et al,* (Docket Nos. 54334-5-6) which has recently

been argued, but no decision has been announced. That case involves a *prosecution* under Section 193-1(i) of the Chicago ordinance—the same ordinance involved in the *Mosley* case, and again, the only issue before the Illinois Appellate Court is the constitutionality of Section 193-1(i). It is noteworthy that the City Corporation Counsel argued before the Illinois Appellate Court that the *Grayned* decision should control the decision in *Polito*. It is foreseeable that the *Polito* decision will be appealed to the Illinois Supreme Court, which on the basis of its decision in *Grayned*, would undoubtedly hold that Section 193-1(i) is constitutional.

II. REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

A. THE PRESENT CONFLICT IN THE LAW MUST BE SETTLED.

It is the position and suggestion of Respondent that the Petition for Writ of Certiorari should be granted so that the important constitutional right of a person to peacefully picket around a public school may be affirmed and so that the present confusion in the law of Illinois will be settled. It is for this reason that Respondent did not, at first, file a reply to Petitioners' Petition for Certiorari.

While it might appear in this case that Respondent's immediate self-interest would be served by denying the Petition for Certiorari, it is the belief of Respondent that in the long-range interest of the law and the uninhibited right of Respondent and others to exercise their constitutional right to peacefully picket that this Honorable Court should grant the Petition for Certiorari to settle the present conflict in the law.

The present state of the law is that within one city in Illinois—Chicago, a person has greater rights to exercise his right to freedom of speech, than in another city of that state—Rockford. This anomaly should not be permitted to stand. Moreover, the Supreme Court of Illinois was fully aware of the well-reasoned decision of the Seventh Circuit in *Mosley* vs. *Police Department* and it had an ample opportunity to change its opinion in *Grayned* upon the motion for a rehearing, but it apparently rejected and ignored the Seventh Circuit's decision and the arguments that the ordinance violated the First Amendment right to free speech, and instead, it affirmed the conviction of that defendant. Indeed, if and

when the case of *City of Chicago* vs. *Polito* is decided by the Illinois Supreme Court, it is likely that the state of the law after the *Polito* decision would be that within the same city—Chicago, an ordinance would be construed to be constitutional by the Federal Court and unconstitutional by the State court, assuming that the Illinois Supreme Court follows its own decision in *Grayned* which appears to be a reasonable assumption based upon its past actions. In order to prevent such a patently incongruous state of the law in an area as vital as the right to free speech, Respondent urges this Court to grant the Petition for Certiorari so that the Seventh Circuit's decision may be affirmed and *Grayned* would thereby be overruled.

B. THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND THE DECISION IN GRAYNED WAS PATENTLY IN ERROR.

Not only are the citizens of Illinois confronted with the situation of having different constitutional rights in different cities, but the right of citizens of all states to lawfully exercise their First Amendment freedom to express one's views by peacefully picketing a public school is of such paramount importance that it should not be left in a state of confusion.

The Seventh Circuit decision, based on the abridgement of the First Amendment, was manifestly correct. The Court simply applied the well-settled decisions of this Court in *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Food Employees* v. *Logan Plaza,* 391 U.S. 308 (1968); *Cameron* vs. *Johnson,* 390 U.S. 611(1968); and *Cox* vs. *Louisiana,* 379 U.S. 559 (1965) which upheld the principle that peaceful picketing carried on in a location opened generally to the public is protected by the First

Amendment. Applying that principle to the Chicago ordinance, which on its face makes no attempt to restrict its application to the manner or purpose of picketing, the Seventh Circuit properly concluded that the ordinance was overly broad as it proscribes all forms of picketing within 150 feet of a school no matter how peaceful, pristine or innocuous.

Respondent is at a total loss to understand how the Supreme Court of Illinois could simply ignore this logical, well-reasoned decision of the Seventh Circuit and the decisions and precedents of the highest Court of the land cited and relied on by the Seventh Circuit.

Moreover, the decision of the Supreme Court of Illinois in *Grayned,* holding that the ordinance did not violate the Equal Protection Clause was equally shocking. This decision is plainly erroneous and should be overruled by affirming the *Mosley* decision. By upholding the Rockford ordinance (identical to the Chicago one) the Court sanctioned "labor picketing" around schools, but no other types. This is the most invidious form of discrimination in violation of the Equal Protection Clause as there clearly can be no rational basis for such a distinction. If peace and tranquillity of the school and the safety of students are at all part of the purpose of this ordinance, it hardly is a reasonable classification to permit hundreds of labor pickets to march around a school from morning until night picketing for higher wages, while one silent marcher picketing for civil rights, or that certain textbooks should be read, is prohibited from doing so.

In *Cox* v. *Louisiana,* 379 U.S. 536 (1965), Justice Black in a concurring opinion addressed himself di-

rectly to the issue presented by the decision of the Supreme Court of Illinois in *Grayned*. He stated:

> ". . . by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an *invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.*" (581, emphasis supplied)

CONCLUSION

For the reasons set forth above, Respondent urges that the Writ of Certiorari be issued so that the judgment and opinion of the Seventh Circuit may be reviewed and affirmed.

Respectfully submitted,

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